

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Exelon Generation Company, L.L.C.)	Docket No. ER00-3251-000
PECO Energy Company)	Docket No. ER99-1872-002
Commonwealth Edison Company)	Docket No. ER98-1734-002
Horizon Energy Company)	Docket No. ER98-380-012
AmerGen Energy Company, L.L.C.)	Docket No. ER99-754-004
AmerGen Vermont, LLC)	Docket No. ER00-1030-001
Unicom Power Marketing, Inc.)	Docket No. ER97-3954-012
Unicom Energy, Inc.)	Docket No. ER00-2429-001

COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 211 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §385.211, the Illinois Commerce Commission (“ICC”) hereby submits its Comments in the above-captioned proceedings. On August 14, 2000, the ICC filed its Notice of Intervention and a Motion for an Extension of Time to file Comments in these proceedings until August 31, 2000. No party filed an objection to the ICC’s Motion for an Extension of Time. As the Commission has not issued a ruling on the ICC’s Motion for an Extension of Time, the ICC hereby respectfully requests that the Commission accept the ICC’s filing of these Comments, *instante*.

I. BACKGROUND

On July 24, 2000, Exelon Generation Company, L.L.C. (“Exelon Generation”), PECO Energy Company (PECO Energy”), Commonwealth Edison Company (“ComEd”), Horizon Energy Company, AmerGen Energy Company, L.L.C., AmerGen Vermont, L.L.C., Unicom Power Marketing, Inc. (“UPMI”), and Unicom Energy, Inc., (collectively, “Applicants” or “the Exelon Companies”) tendered for filing the Application of Exelon Generation for Market-based Rate Authority and the Application of

Exelon Corporation Subsidiaries and Affiliates for Other Forms of Relief under Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. §824d. The Applicants explained that Exelon Corporation (“Exelon Corp.”) will be a public utility holding company that will be created upon the completion of the merger between Unicom Corporation and PECO Energy, and the post-merger restructuring of PECO Energy and ComEd. Application at 1. Exelon Generation will exist as the generating company and wholesale power marketing subsidiary of Exelon Corporation, and PECO Energy and ComEd will transfer their generating facilities to Exelon Generation during the post-merger restructuring. Id. at 1, 4.¹ The subsidiaries and affiliates of PECO Energy and ComEd will become affiliates of each other and subsidiaries of Exelon Corp. See, Id. at App. A (depicting the Exelon Corp. post-merger, post-restructuring organizational chart).

The Applicants make a number of requests for relief, both with regard to themselves as individual applicants and on behalf of Exelon Corp. and Exelon Generation, which, as stated above, are not yet formed or in existence.² In relevant part to the ICC’s Comments, the Applicants ask for the Commission to grant Exelon Generation market-based rate authority for sales of electric capacity, energy and, in certain markets, ancillary services. Id. at 1-2, 7-18. Similarly, the Existing Exelon Public Utility Subsidiaries note that as a result of the ComEd and PECO Energy merger, they will become affiliated with additional companies that own or control generating resources. These subsidiaries request a finding that their change in status will not affect the Commission’s prior approval of their market-based rate authority. Id. at 2-3, 18-19. Finally, the Applicants request a waiver of the Commission’s inter-

¹ Exelon Generation will also assume ComEd’s and PECO Energy’s rights and responsibilities under existing power purchase contracts.

² For ease in reference, the balance of these Comments are drafted as though Exelon Corp. and Exelon Generation exist and are making the specific requests on their own behalf.

affiliate power sales pricing limitations and code of conduct rules, including the affiliate power brokering rules. Id. at 3, 19-28.

Pursuant to the Applicants' two requests for market based rate authority, the Applicants note that they are required to show that a grant of market-based rate authority will not result in Exelon Generation or any of its subsidiaries possessing market power related to the ownership or control of generation facilities, transmission facilities or potential barriers to entry; or in non-compliance with safeguards that are necessary to prevent affiliate abuse. Id. at 7 (citing Progress Power Marketing, Inc., 76 FERC ¶61,155 (1996); Public Service Co. of New Mexico, 75 FERC ¶61,266 (1996); Heartland Energy Services, Inc., 68 FERC ¶61,223 (1994)). Accordingly, as one basis for the Applicants' market based rate requests, the Applicants seek a Commission finding that for the period beginning with the consummation of the ComEd and PECO Energy merger through the end of the year 2003³, neither Exelon Generation nor any of its affiliates will have generation market power in any relevant markets. Id. at 11. The basis for the Applicants' requests with regard to both Exelon Generation and the Existing Exelon Public Utility Subsidiaries rests in certain, previous Commission rulings. Specifically, the Commission has previously granted authority for all of the Existing Exelon Public Utility Subsidiaries to sell wholesale power at market based rates⁴. In addition, in the ComEd and PECO Energy merger

³ The Applicants recognize that they will need to adhere to the Commission's practice of reviewing market-based rate authority grants every three years and, therefore, that they will need to submit updated market-based rate analyses with regard to all of the Commission's approvals for market-based rate authority within the context of this proceeding within three years of the Commission's grant of such authority.

⁴ See, Application at 8 n.15 (citing PECO Energy Co., 74 FERC ¶ 61,336 (1996), reconfirmed with updated market-power analysis, PECO Energy Co., Letter Order in Docket No. ER99-1872-000 (March 25, 1999); Commonwealth Edison Co., 82 FERC ¶ 61,317 (1998); Horizon Energy Co., 81 FERC ¶ 61,368 (1997); Jersey Central Power & Light Co., 87 FERC ¶ 61,014 (1999)(granting market-based rate authority to AmerGen Energy, as confirmed in orders accepting changes in status in AmerGen Energy's market-based rate authority related to acquisitions of additional generating capacity, Illinois Power Co. and AmerGen Energy Co., 89 FERC ¶ 61,233 (1999), Niagara Mohawk Power Corp., 89 FERC ¶ 61,124 (1999), and Jersey Central Power & Light Co. and AmerGen Energy Co., 90 FERC ¶ 61,134 (2000)); AmerGen Vermont,

proceeding, a market power screen analysis was submitted in accordance with Appendix A of the Commission's Order 592 Merger Policy Statement and, in response thereto, the Commission stated that it does "not believe that the horizontal aspects of the proposed merger related to consolidating generation will adversely affect competition." Id. at 10-11 (citing Commonwealth Edison Co. and PECO Energy Co., 91 FERC ¶61,036 at ¶ 61,134 (2000)("Merger Order")).

As Exelon Generation will merely combine all of the Existing Exelon Public Utility Subsidiaries' generation facilities and purchase power contracts within its common ownership and control, the Applicants conclude that the Commission's previous rulings are sufficient to justify a finding that Exelon Generation will not have generation market power in any relevant market. Id. at 11. In addition, even though the Existing Exelon Public Utility Subsidiaries recognize that the completion of the merger and subsequent restructuring activities will change the underlying bases upon which the Commission relied to grant each subsidiary market-based rate authority because each subsidiary will become affiliated with other entities that own and control generation facilities, the Applicants assert that no Exelon affiliate will possess generation market power post-merger. Id. at 18. With the sole exceptions of ComEd and UPMI, each Exelon affiliate makes this assertion without providing the Commission with an updated market power analysis based on this change in circumstance. Instead, the remaining subsidiaries request confirmation of continued market-based rate authority by relying entirely on the Commission's finding in the ComEd and PECO Energy merger proceeding. Id.

L.L.C., 90 FERC ¶ 61,307 (2000); Unicom Power Marketing, Inc., 81 FERC ¶ 61,048; Unicom Energy, Inc., 91 FERC ¶ 61,305 (2000)).

With regard to ComEd and UPMI, the Applicants submit an updated market-based rate analysis.⁵ Specifically, the Applicants' witness, Dr. William H. Hieronymus, provides an analysis that updates for the period 2001 through 2003 the market power studies that ComEd and UPMI submitted with their previously filed and approved market-based rate applications. Id. at App. B. The analysis provided by Dr. Hieronymus uses the hub-and-spoke methodology that the Commission typically employs in the context of applications for market-based rate authority. Using this method of market power analysis, Dr. Hieronymus concludes that, even with ComEd's and UPMI's impending affiliations with PECO Energy and its affiliates, neither ComEd nor UPMI will have market power in any of the relevant markets. Id. at 9. Therefore, ComEd and UPMI request blanket authorization to sell wholesale power at market-based rates.

Notably, in the Commission's previous order approving market-based rate authority for ComEd, the Commission did not grant ComEd authority to make market-based sales in the following markets because of market power concerns: Batavia, Naperville, St. Charles, Geneva, Rock Falls, Rochelle, Winetka, Central Illinois Light Company and the Wisconsin Upper Michigan System ("WUMS") subregion of the MidAmerica Interconnected Network ("MAIN"). Commonwealth Edison Co., 82 FERC ¶61,317 at ¶62,249 (1998). The municipal utilities on this list represented the wholesale market within ComEd's service area at the time of ComEd's market-based rate application, and the Commission determined that market-based rates were inappropriate within these areas due to

⁵ ComEd and UPMI provide this analysis in recognition of the Commission's requirement imposed on its previous grant of market-based rate authority for these companies, consistent with the Commission's practice with regard to other applicants for market-based rate authority, that each company resubmit its market power analysis within three years of the Commission's approval thereof. ComEd and UPMI state that they are providing their required market power analyses with this instant filing rather than waiting until their otherwise applicable deadlines of the Spring of the year 2001 for ComEd and the Fall of the year 2000 for UPMI. Application at 9.

market power concerns⁶. Id.; see also, Application at 12 (acknowledging that ComEd previously committed not to sell at market-based rates in the aforesaid areas because ComEd's share of installed generating capacity within those areas exceeded the percentages the Commission has previously found "not to raise market power concerns"). The Applicants request that these market exclusions be removed from any market-based rate authority granted to Exelon Generation within the context of this proceeding. Application at 11-12.

The Applicants also request a waiver of the Commission's inter-affiliate power sales pricing limitations and code of conduct rules, including the affiliate brokering rules⁷. Id. at 3, 19-28. The Applicants assert that such a waiver is appropriate because all of the Applicants' retail and wholesale requirements customers are subject to retail access, rate caps and freezes, and other mechanisms. Id. at 3, 19. Specific to Illinois, the Applicants note that the Illinois Electric Service Customer Choice and Rate Relief Law of 1997 ("Illinois Customer Choice Law"), 220 ILCS 5/16-101 et seq., provides all retail customers with the option for choice by May 1, 2002, and caps retail rates through January 1, 2005. Id. at 23. Therefore, the Applicants claim that the Illinois Customer Choice Law will protect Illinois consumers from any harms that would otherwise result from affiliate abuse. Id. at 22-26.

On July 27, 2000, the Commission issued a Notice of Filing and established August 14, 2000, as the date for filing all comments, protests and motions with regard to the Applicants' filing. On August 14, 2000, the ICC filed its Notice of Intervention and a Motion for an Extension of Time to file comments in this proceeding until August 31, 2000. No party filed an objection to the ICC's Motion

⁶ As explained *infra*, the wholesale market within ComEd's service area will expand beyond these limited municipal utilities to include *all* of the load within ComEd's service area as retail choice in Illinois unfolds, and the ICC is concerned that market-based rates within ComEd's service area may remain inappropriate due to market power problems.

for an Extension of Time. As the Commission has not issued a ruling on the ICC's Motion for an Extension of Time, the ICC is hereby submitting its Comments in this proceeding and respectfully requests that the Commission accept the ICC's filing of these Comments, *instantly*.

II. ICC POSITION AND RECOMMENDATION

The Illinois Public Utilities Act ("PUA") charges the ICC with regulating public utilities in the State of Illinois. 220 ILCS 5/1-101 et seq. As part of the ICC's regulatory duties, the ICC is required to ascertain that public utilities' rates, charges, and rules and regulations relating to rates and charges for retail service within Illinois are just, reasonable and non-discriminatory. 220 ILCS 5/9-101 to 5/9-252. The ICC is also statutorily directed to "act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." 220 ILCS 5/16-101A(d). This statutory direction is based on the Illinois General Assembly's finding that "a competitive wholesale and retail market must benefit all Illinois citizens." Id.

The ICC is concerned that the granting of the Applicants' above-described requests may have an adverse effect on the rates and charges for retail service within Illinois. Specifically, a grant of the Applicants' requests for market-based rates and waiver of inter-affiliate power sales pricing limitations and code of conduct rules, including the affiliate power brokering rules, could result in increased wholesale prices due to wholesale market power that will be passed on to Illinois retail consumers in the form of increased future retail service rates. The ICC is also concerned that the exercise of market power in the wholesale markets will hinder the "development of an effectively competitive electricity

⁷ ComEd and PECO Energy do not seek waiver of the requirements of the Commission's Order 889 Standards of Conduct codified in Section 37.4 of the Commission's regulations, 18 C.F.R. §37.4. Application at 28 n.37.

market that operates efficiently and is equitable to all consumers,” in opposition to the directives of the Illinois Customer Choice Law.

Nonetheless, the ICC does not, at this time, request that the Commission completely deny the Applicants’ requests. The ICC takes this position for two reasons. First, Illinois retail ratepayers are currently protected from higher rates by a statutorily mandated retail rate freeze on bundled retail power service. 220 ILCS 5/16-111(a). Second, as retail direct access unfolds in Illinois and retail customers become directly eligible for the benefits that a competitive wholesale market could provide, specific steps must be taken by the Exelon companies, by the ICC and by the Commission to ensure that genuine benefits of wholesale competition develop. The three year period proposed by the ICC below provides a window of opportunity to accomplish this work.

Currently, as noted by the Applicants, the Illinois Customer Choice Law imposes retail rate freezes through January 1, 2005. *Id.* (establishing the retail rate freezes during the “mandatory transition period”); 220 ILCS 5/16-102 (defining “mandatory transition period” as the effective date of the Illinois Customer Choice Law, i.e., December 16, 1997, through January 1, 2005). Accordingly, any increase in wholesale rates that would result from the exercise of generation market power or inter-affiliate abuse cannot be passed on to Illinois retail consumers in the form of higher bundled retail rates through January 1, 2005. However, the ICC will establish new retail power sales rates to be effective on January 2, 2005. At that time, the ICC believes that Illinois’ retail consumers may be subjected to unjust and unreasonable bundled retail rates because of the Applicants’ exercise of generation market power in the wholesale market and the lack of affiliate transaction rules in the establishment of wholesale rates.

Accordingly, through these Comments, the ICC seeks to protect Illinois retail customers from future retail rates, bundled and unbundled, that reflect increased wholesale prices that may arise from the

exercise of generation market power and inter-affiliate abuses. The ICC respectfully requests that the Commission take steps to ensure the development of a competitive wholesale power market in the ComEd service area and act to protect Illinois' retail consumers from any unjust and unreasonable pass-through of market-based wholesale rates when the statutorily mandated Illinois rate freeze expires. To accomplish this, the ICC recommends that, if the Commission approves the Applicants' requests in this proceeding, such approval be conditioned on the following:

- (1) a *de novo* review of the Applicants' requests for market-based rate authority when the Applicants file their updated analysis in 2003;
- (2) a requirement that the Applicants perform and submit the Market Power Analysis described in the Commission's Order 592 Merger Policy Statement Appendix A with respect to the ComEd service area at the *de novo* review of the Applicants' market-based rate authority request in 2003; and
- (3) the rejection of Applicants' request to waive the employee separation and power market information aspects of the Commission's code of conduct and rescission of any waiver of the Commission's inter-affiliate non-power goods and services transaction rules prior to the beginning of the test year that ComEd will utilize to establish bundled retail sales rates in Illinois to be applicable following the expiration of the statutorily mandated retail rate freeze in Illinois.

In the alternative to the ICC's second recommended condition, if the Commission does not agree to the use of the market power analysis described in the Commission's Order 592 Merger Policy Statement Appendix A, the ICC requests that the Commission establish a technical conference, to be held in Chicago, Illinois, within the next three months at which an acceptable alternative market power analysis methodology can be developed.

The ICC's concern and request is not premature. The Commission must specify *now* the market power standard to be applied to the ComEd service area in the year 2003 and make clear the results of that market power analysis that will be sufficient to permit Exelon Generation to continue to

retain market-based rates after 2003 in order to avoid the need to immediately institute cost-based wholesale rates within the ComEd service area⁸. Only by clarifying its intent at this time will the Commission provide all parties with sufficient time to take steps to satisfy that standard or, alternatively, to prepare for the consequences should Exelon Generation not be able to meet that standard.

Further, in the intervening three years between now and the submission by Exelon Generation of the prescribed market power analysis in 2003, the ICC and the Commission must continue to develop their market monitoring infrastructure to be better able to oversee the Exelon Companies' progress in addressing the market concentration problems and market power problems identified by the ICC in these Comments. Moreover, beyond market monitoring, the Commission must take all available steps to reduce the barriers to entry into concentrated generation markets such as northern Illinois. These steps include facilitation of generation installation within the concentrated area (through, for example, streamlined generator interconnection standards) and facilitation of transmission construction into the concentrated area (through, for example, adoption of effective transmission congestion management mechanisms and facilitation of effective RTO transmission planning authority). When conditions conducive to the exercise of market power are present, as the ICC suggests is the case within ComEd's service area, the Commission must act to remove those conditions (the ICC recognizes that this may take some period of time). Finally, when market power is found to have actually been exercised, the Commission must act immediately and decisively, to the extent of its statutory authority, to eliminate the continued exercise of that market power and to address the damage done by its exercise. The ICC stands ready to work with the Commission in each of these endeavors because effectively competitive

⁸ The only apparent alternative to the ICC's proposal for addressing the market power concerns identified herein over the next three years is for the Commission to reject the applicants' requests and to immediately initiate a proceeding

retail markets cannot be developed in the absence of effectively competitive wholesale markets. The Illinois legislature recognized this market feature and, accordingly, directed the ICC to promote the development of effectively competitive wholesale and retail markets that will benefit all Illinois citizens.

III. DISCUSSION OF RECOMMENDATIONS

A. **The Commission should condition any grant of market-based rate authority on a *de novo* review of the Applicants' market-based rate analysis to be submitted in 2003.**

The ICC is concerned about the ability of the Exelon companies to exercise generation market power within ComEd's service territory and to engage in market-damaging affiliate preference transactions. In particular, if the Applicants' request is granted without mitigation and not effectively re-examined for market power on or before 2003, the ICC is concerned that retail direct access will not bring benefits to the retail customers in ComEd's service territory and may, in actuality, bring harm to retail customers.

High market shares and high measures of market concentration indicate the relative ability of a firm to exercise market power, either unilaterally or by acting in concert with a limited number of other sellers. Employing the traditional hub-and-spoke methodology, the Applicants' witness Dr. Hieronymus testifies in this docket that ComEd has as much as 25% of the market share for generation within ComEd's service territory⁹. Application at Attachment B ("Hieronymus Affidavit") at Exhibit No. WHH-6. However, employing a more realistic, and more detailed, delivered price test, the Dr. Hieronymus testified in the ComEd/PECO Energy merger proceeding that, within ComEd's service

to establish wholesale cost-based rates to be applicable within the ComEd service area.

⁹ The ICC notes the Commission's general "rule of thumb" that market shares of 20% or less under the hub-and-spoke model do not typically arouse market power suspicions and that, under certain circumstances, market shares up to 26% do not raise market power concerns. See e.g., Southwestern Public Service Co., 72 FERC ¶ 61,208 (1995); Southern Company Services, Inc., 72 FERC ¶ 61,324 (1995).

territory, ComEd has as much as 75.7% market share in the summer peak period and no less than 63.4% market share in any period. Direct Testimony of William H. Hieronymus, Applicants' Exhibit APP-306 at 1, Dkt. EC00-26-000 (filed Nov. 22, 1999)(“Hieronymus Merger Testimony”). The Exelon companies together, i.e., Exelon Generation, have as much as 75.4% market share in the summer peak period and no less than 64.5% market share in any period within the ComEd service area. Id.

The Hirschman-Herfindahl Index (“HHI”) is a commonly used measure of market concentration. Under the assumptions adopted by Dr. Hieronymus, the aforesaid numbers lead to an HHI of between 4,177 and 5,791. Id. By way of reference, both the Department of Justice Merger Guidelines and the Commission’s own Merger Guidelines characterize a market as “highly concentrated” if the HHI exceeds 1800. Exelon Generation’s HHI within the ComEd service area exceeds this standard by a wide margin.¹⁰

In the past, market shares of this magnitude may not have been of strong market power concern to the Commission, given the small relative size of the wholesale buyers to which they applied and the magnitude of generation capacity available to be imported over the transmission system. In fact, in the ComEd and PECO Energy merger proceeding, Dr. Hieronymus identified the small size of the relevant load of the wholesale transmission dependent utilities (TDUs”) within ComEd’s service territory to the total amount of available importable supply as a factor tending to shield the TDUs from an exercise of ComEd market power. Hieronymus Merger Testimony, Exhibit APP-300 at 36. However, as the

¹⁰ In a market with an HHI of 1800 or above, a merger that raises the HHI by at least 100 is presumed to create or enhance market power. Order No. 592 at 71. While ComEd’s merger with PECO raised the HHI by as much as 224 points, See, Hieronymus Merger Testimony, Exhibit APP-306 at 1, and would, therefore, overwhelmingly fail the Commission’s Merger Policy screen, the Commission approved the merger anyway on mitigating circumstances as will be explained, *infra*.

retail market within ComEd's service territory opens up, the limited physical availability of generation substitutes within ComEd's service territory and limited transmission import capability will become a significant concern.

Specifically, a large portion of ComEd's commercial and industrial load, around 9,000 MW, became available for direct access on October 1, 1999. All of ComEd's non-residential load will be available for retail direct access by the end of 2000. In 1997, ComEd had about 6,300 MW of commercial load and about 4,500 MW of industrial load. Embedded Cost of Service Study, ComEd Exhibit 10.1 (revised) at 25, ICC Dkt. 99-0117 (filed Mar. 29, 1999). By May 1, 2002, all of ComEd's retail load will be eligible for direct retail access. The effect of retail direct access, in combination with the transfer of ComEd's generating plants to Exelon Generating and to Edison Mission Energy, is to make ComEd's retail load directly subject to the wholesale market. Accordingly, by May 1, 2002, all of ComEd's retail load will be directly impacted by the wholesale market.

In the merger proceeding, the applicants' witness Mr. Steven T. Naumman testified that the "first contingency incremental simultaneous import capability for Summer 2001 is 4,500 MW." Direct Testimony of Steven T. Naumann, Exhibit No. APP-400 at 27, Dkt. EC00-26-000 (filed Nov. 22, 1999). Mr. Naumann stated that the "4,500 MW is composed of a 2,500 MW transfer from the East (AEP, PJM and Virginia Electric and Power), 1,000 MW from the South (TVA and Entergy) and 1,000 MW from Iowa and Wisconsin." Id. at 27-28. By way of contrast, ComEd's expected peak load for 2001 is 20,000 MW. Hieronymus Affidavit at Exhibit No. WHH-2. This leaves a large amount of load within ComEd's service territory that must, of necessity, be served by generators within ComEd's service territory. As explained above, all of this load will be subject to the wholesale market

by May 1, 2002; and of the available generators to serve this load, the Exelon companies, and Exelon Generating in particular, will own or control the vast majority.

As a counter-point to the large market share of generation capacity owned or controlled by the Exelon companies within ComEd's service territory, Dr. Hieronymus argued in the ComEd and PECO Energy merger proceeding that "the lower the variable cost of producing energy from a given plant, the less likely it is that withholding capacity from that plant is profitable" and that ComEd *owns* nuclear plants that have low variable cost and are difficult to ramp up and down, i.e., withhold. Hieronymus Merger Testimony at 46-47. The Commission found merit in this argument as follows:

Our analysis of market supply and demand conditions in the ComEd destination market indicates that almost all of the merged company's economic capacity is relatively low-cost nuclear capacity and, for most hours of the year, market demand falls well within the critical region of market supply accounted for by such capacity. [fn. An examination of market supply conditions shows three reasons why a profitable withholding strategy by ComEd would be unlikely: (a) for most hours during the year, the supply curve is relatively flat, so withholding capacity would not significantly raise the market price; (b) for those hours during which it could successfully raise market price, ComEd would have to forgo sales from its low-cost nuclear capacity; and (c) ComEd's only generation is nuclear which is difficult to ramp down or up so as to withhold output during the most profitable time periods.]

Merger Order at 17, n.42 (emphasis added).

In cases where a company controls a portfolio of generation assets with varying marginal costs, the Commission is correct that nuclear plants, which are low cost base-load generators, cannot be used to manipulate price because they are difficult to withhold from the market. In such cases, it does not make economic sense for a market participant to withhold the generation of higher cost units to place upward pressure on price. However, in the hypothetical case where ComEd/Exelon Generation only owns nuclear generation, and does not own or control other generation, the HHI would still be above 3000 and the market share above 40%. This level of market concentration might still make it profitable

for ComEd/Exelon Generation to manipulate price by withholding generation from the nuclear units. The testimony submitted by Dr. Hieronymus in the merger proceeding supports this argument. In particular, he stated that “capacity that has a cost that is well below the market price can, other things being equal, be withheld.” Hieronymus Merger Testimony, Exhibit APP-300 at 46.

Nonetheless, even if we accept ComEd’s arguments concerning their inability to use nuclear generation (9,200 MW) to unilaterally manipulate generation availability and hence, the market, the Exelon subsidiaries exercise significant levels of control, through contracts, of unaffiliated generation within ComEd’s service territory; and this generation capacity has the characteristics that even the Commission described above as conducive to withholding. For example, in 2000, ComEd sold 9,300 MW of fossil generation to Edison Mission Energy. Hieronymus Affidavit at 4. ComEd entered into three power purchase agreements with Edison Mission Energy that will extend through 2004. Each of these contracts:

consists of a fixed contractual amount of megawatts and options for additional or lesser amounts over time. The coal PPA consists of a declining amount of contracted capacity, with the remainder subject to a purchase option. The Collins PPA and the peaking unit PPAs consist of a flat amount of contracted capacity, but an option to drop units in years 3-5.

Id. at 4 n.8. While ComEd is not the plant operator for this generating capacity, ComEd controls the output of the capacity contracted for plus the capacity on which the purchase option is exercised. In addition, ComEd controls a significant amount of other non-affiliated generation from the Elwood Energy Center, the Lincoln Energy Center, and the Rockford Energy Center. See, Id. at Exhibit No. WHH-3. ComEd’s control translates into an effective ability to withhold the output of these plants from the market.

Finally, even if we accept the argument that nuclear generation is difficult to withhold so as to manipulate the market *and* we ignore the significant levels of control over non-affiliated generating capacity exercised by ComEd/Exelon Generation through contract, given the limited number of major generation market participants, i.e., high market concentration, within ComEd's service area, the Exelon companies could easily engage in various kinds of collusion with non-affiliated companies, perhaps tacitly, to jointly manipulate the market. Accordingly, while the ICC is not prepared to challenge, at this time, the Applicants' requests for wholesale market-based rates because any immediate and actual harm to retail customers attributable to the exercise of market power by the Exelon companies will be limited by the Illinois bundled rate freeze through January 1, 2005, the ICC is concerned that the Exelon Companies' ability to exercise market power could do damage to the development of a competitive market environment in Illinois and, in particular, within ComEd's service territory. Wholesale market power directly harms the retail market in two ways. First, it leads to the establishment of bundled retail rates that are higher than they would be absent the existence of wholesale market power. Second, it leads to higher prices and fewer choices for customers who choose to exercise their right to take unbundled retail power sales service. As recent events in other States (for example California) demonstrate, a flawed wholesale market can have dramatically detrimental effects on otherwise sound retail markets.

1. Effect of Wholesale Market Power on Bundled Retail Rates

The ICC will be circumscribed in its ability to address the Exelon Companies market power in the context of setting new bundled retail rates to be effective January 1, 2005. Once ComEd completes the transfer of its remaining generating plants to Exelon Generation, ComEd's *entire* power requirements will be obtained at wholesale, either from affiliates or non-affiliates. The federal filed rate

doctrine requires the ICC to permit retail rates to reflect the Commission approved wholesale rates at which ComEd will purchase its power requirements even if the Commission approved wholesale rates are market-based rates like the Exelon Companies seek authority to charge in this proceeding. Narragansett Electric Co. v. Burke, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978).

Similarly, the federal filed rate doctrine will constrain the ICC's ability to review and disallow inter-affiliate costs for non-power goods and services. Exelon Corporation is a registered public utility holding company under the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C.S. §§ 79a to 79z-6. Section 13 of PUHCA provides as follows:

[I]t shall be unlawful for any subsidiary company of any registered holding company ... to enter into or take any step in the performance of any service, sales, or construction work for, or sell goods, to any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

15 U.S.C.S. § 79m(b). Therefore, inter-affiliate pricing of non-power goods and services between subsidiaries of Exelon Corporation and their affiliates is subject to the jurisdiction of the Securities and Exchange Commission ("SEC").

In Ohio Power Co. v. FERC, the United States Court of Appeals held that the SEC's regulatory authority over inter-affiliate pricing of non-power goods and services between holding companies' subsidiaries and their affiliates prevents the Commission from establishing wholesale rates that do not pass through the SEC approved cost-based rates for such non-power goods and services transactions. 954 F.2d 779 (D.C. Cir. 1992). The court had two bases for its holding. First, the Commission's attempt to substitute the price for non-power goods and services to be included in the

subsidiary's wholesale rates was a direct violation of a Commission regulation that states, in pertinent part, as follows:

Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

Id. at 783-84 (citing 18 C.F.R. §35.14(a)(7)(emphasis added)). Second, the SEC's statutory authority takes precedence over the Commission's statutory authority to set just and reasonable wholesale rates, therefore preventing the Commission from questioning the reasonableness of the SEC's approved rate. Id. at 784-85. The court's second rationale essentially encompasses the notion of the federal filed rate doctrine and would apply equally to the ICC's ability to question the reasonableness of the prices paid in such inter-affiliate transactions in the ICC's determination of just and reasonable bundled retail rates.

In the ComEd and PECO Energy merger proceeding, the applicants agreed to waive their Ohio Power immunity from Commission regulation of non-power inter-affiliate sales and agreed, for ratemaking purposes, to follow the Commission's policy regarding treatment of costs and revenues of affiliate non-power transactions.¹¹ 91 FERC ¶ 61,036 at ¶ 61,137 (2000). Unfortunately, it appears to the ICC that a grant of the Applicants' request in the instant docket to waive the Commission's inter-affiliate code of conduct rules would, in effect, revoke the Applicants' prior commitment concerning inter-affiliate non-power sales transactions in the merger proceeding. The Applicants request a waiver of all elements of the Commission's code of conduct, including "the pricing of inter-affiliate non-power goods and services." Application at 25.

¹¹ Notably, the applicants did not agree to waive their Ohio Power immunity with regard to any State commission review of SEC approved costs when determining just and reasonable retail rates.

Nevertheless, the ICC's ability to establish new retail rates that it believes to be just and reasonable will be circumscribed by the application of the federal filed rate doctrine to the determinations of either the SEC or the Commission concerning rates for wholesale power and for non-power goods and services. Furthermore, while the ICC will have the authority to determine the prudence of ComEd's decisions to enter into transactions for the purchase of wholesale power and non-power goods and services, see, Pike County Light & Power Co. v. Pennsylvania PUC, 465 A.2d 735, 738 (1983)(establishing that the filed rate doctrine does not restrict the authority of State commissions to engage in prudence reviews), the limited transmission import capability into ComEd's service territory and the high concentration of generation ownership within ComEd's service territory will significantly increase the difficulty of proof in such cases. Typically, proof that a utility acted imprudently in entering into a transaction takes the form of evidence of available, cheaper alternatives that the utility forewent to enter into the transaction in question. See e.g., Id. at 271 (upholding the State commission's ruling that Pike's reliance on its parent as a source of power was 'an abuse of management discretion in consideration of available, alternative, more economical, supplies of electricity'). Given the limited transmission import capability into and the high concentration of generation ownership within ComEd's service territory, generation supply alternatives for ComEd may be limited and ComEd may easily be able to argue that no better alternatives existed than the chosen transactions, which will likely be transactions with ComEd's affiliates such as Exelon Generation.

In fact, the Commission has even recognized the difficulty of proving the imprudence of a utility entering into transactions to purchase power at a given price instead of seeking out available, alternative, more economical supplies of electricity. Specifically, in Heartland Energy Services, Inc., the Commission addressed this issue while discussing a request for market-based rate authority and making

the Commission's traditional inquiry into affiliate abuse in the context of its review of a market-based rate request. 68 FERC ¶ 61,223, 1994 FERC LEXIS 1722 at 45-46 (1994). The Commission stated as follows:

It is very difficult to prove in a rate case that a public utility did not aggressively seek opportunities to purchase cheaper power for its ratepayers; therefore, it is unlikely that the Commission can rely solely on prudence inquiries in the rate case process to police this type of potential abuse.

Id. The ICC will likely be confronted with similar proof issues when making its prudence reviews of ComEd's purchase power decisions.

2. Effect of Wholesale Market Power on Unbundled Retail Rates

Some may argue that the ICC's concerns about its circumscribed ability to establish just and reasonable retail bundled rates are misplaced because, as of May 1, 2002, all ComEd retail customers will have retail choice and, therefore, not be captive to ComEd as a supplier or to bundled retail service. Indeed, the level of bundled retail rates may not matter as much if all retail customers are truly free to exercise choice to access an alternative power supplier and alternative generation supply. However, given the limited transmission import capability into ComEd's service territory and the high concentration of generation ownership within ComEd's service territory, choice for the majority of retail customers within ComEd's service territory may be more illusory than real. While retail customers may not be *actually* captive to Exelon generation after May 1, 2002, many will remain *practically* captive because of the limited availability of generation supply alternatives.

Therefore, the Commission should utilize its authority over wholesale rates to ascertain that the ICC is not faced with the prospect of passing-through unjust and unreasonable wholesale rates to retail consumers in ComEd's service territory. The Commission can accomplish this goal by undertaking a *de*

novo review of the generation market power possessed by Exelon Generation in ComEd's service territory in the year 2003 to allow the detection of such market power prior to the establishment of Illinois retail rates to take effect on January 2, 2005. If market power is detected, the Commission will have the ability at that time to take steps to mitigate such market power or, if sufficient steps are not available, to re-established cost-based wholesale rates, thereby ascertaining that Illinois retail consumers will not be subject to retail rates that reflect a pass-through of market-based rates established through the exercise of market power or affiliate preference.

B. The Commission should direct Exelon Generation to perform and submit the market power analysis described in the Commission's Order 592 Merger Policy Statement Appendix A with respect to ComEd's service area at the next regularly scheduled market power update in 2003.

The Commission typically employs a "hub-and-spoke" model in its review of market-based rate applications that is deficient in several respects that are described below. The Commission's merger policy statement market power analysis methodology addresses all of the deficiencies in the hub-and-spoke model. This market power analysis methodology clearly describes the Commission's expectations for the calculation of HHIs. Practically the only parts of the test that are not relevant or applicable to the circumstances of market-based rate applications are the thresholds for the allowable increase in the HHI due to a merger. In the context of market-based rate applications, the HHIs would stand on their own.

1. The Hub-and-Spoke Model and Its Deficiencies

a. The Hub-and-Spoke Model

As stated, the Commission typically employs a "hub-and-spoke" model in its review of market-based rate applications. A hub-and-spoke analysis measures market shares in the markets for total and

uncommitted generating capacity within the applicant's service area and in first-tier interconnected markets, i.e., those markets directly interconnected with the applicant. The hub-and-spoke methodology has been developed and applied by the Commission to a number of different types of sellers over the last ten years, beginning with independent power producers and unaffiliated marketers and proceeding to traditional investor owned utilities and their affiliates. See e.g., Heartland Energy Services, Inc., 68 FERC ¶ 61,223 (1994). An applicant must perform a separate analysis for its own service area and for each utility service area that is directly interconnected with the applicant. See e.g., New York State Electric & Gas Corp., 78 FERC ¶ 61,309 at ¶ 62,328 (1997). With respect to an applicant's own service territory, the Commission's standard methodology requires the applicant to compare its controlled generating capacity to the sum of the generating capacity controlled by itself, any alternative generating capacity in the service area and all generating capacity in the first tier utilities. Id. The Commission states that its traditional hub-and-spoke generation dominance analysis "examines the relative size of the sellers as a measure of the ability of a utility to dominate electricity supply in a geographic market or to raise prices by withholding capacity." Id.

ii. Deficiencies in the Hub-and-Spoke Model

The hub-and-spoke methodology suffers from several deficiencies that would make its use by the Commission to evaluate market power inadequate. Specifically, the hub-and-spoke methodology does not produce accurate definitions of geographic markets because it does not account for transmission import limitations and transmission constraints in the specification of the relevant market. Transmission system factors are critical in assessing the ability of generators outside the ComEd service area to compete with generators inside the ComEd service area to serve load inside the ComEd service area. The significance of transmission import limitations, transmission constraints and transmission system power flows in market power analysis have been previously recognized by the Commission in a host of cases. See e.g., Consolidated Edison of New York, Inc., 78 FERC ¶ 61,298 (1997); Plum Street and Niagara Mohawk, Inc., 76 FERC ¶ 61,319 (1996); Wisconsin Public Service Corp., 75 FERC ¶ 61,057 (1996). The Commission set the market-based rate applications in each of the cited proceedings for hearing to examine the relationship between transmission import limitations/transmission constraints and the ability of the applicant to exercise generation market power.

In addition, the hub-and-spoke model produced inaccurate specifications of alternative generation suppliers for two reasons. First, in relation to the fact that the model does not take into account transmission limitations and transmission constraints, the model fails to account for the physical feasibility of deliveries by alternative generation suppliers. Second, the model does not account for unit operating costs, unit operating characteristics and unit dispatch. These factors are critical in assessing the likely response of other generation suppliers as substitutes for the Applicants' generation for serving load inside ComEd's service area.

In short, without an accurate specification of the alternative suppliers that represent real, competitively priced options, one cannot ascertain whether there is a workably competitive market to restrain Applicants from raising prices above competitive levels. Indeed, the Commission recognized the deficiencies associated with the hub-and-spoke model in its Merger Policy Order as follows:

An accurate assessment of the effect on markets depends on an accurate definition of the markets at issue. The Commission's current analytic approach [hub-and-spoke] defines geographic markets in a manner that does not always reflect accurately the economic and physical ability of potential suppliers to access buyers in the market.

Order No. 592 at 20. As the ICC explained above, as the amount of previously-bundled load available for retail direct access increases and an increasing amount of utility-owned generating plants are transferred to utility affiliates and non-affiliates, an increasing amount of load becomes directly subject to the wholesale market. Under such circumstances, continued retention of the Commission's traditional hub-and-spoke methodology for evaluating market power becomes increasingly inadequate.

2. The Merger Policy Statement "Appendix A" Market Power Test

In 1996, the Commission recognized the problems associated with applying the traditional hub-and-spoke market power analysis in merger applications. The Commission developed an alternative, more rigorous, market power analysis to be applied in those circumstances. The Commission summarized the steps in its new methodology as follows:

- (1) Identify the relevant products. Relevant products are those electricity products or substitutes for such products sold by the merging entities.
- (2) Geographic markets: identify customers who may be affected by the merger. Generally, these would include, at a minimum, all entities directly interconnected to a merging party and those that historical transaction data indicate have traded with a merging party.
- (3) Geographic markets: identify potential suppliers that can compete to serve a given market or customer. Suppliers must be able to reach the market both physically and

economically. There are two parts to this analysis. One is determining the economic capability of a supplier to reach a market. This is accomplished by a delivered price test, which accounts for the supplier's relative generation costs and the price of transmission service to the customer, including ancillary services and losses. The second part evaluates the physical capability of a supplier to reach the customer, that is, the amount of electric energy a supplier can deliver to a market based on transmission system capability.

- (4) Analyze concentration. Concentration statistics must be calculated and compared with the market concentration thresholds set forth in the Guidelines.

Order 592 at 26. This same method of market power analysis should be applied in situations other than mergers, such as market power analyses of market-based rate applications.¹²

The ICC notes that the Commission addressed a similar request in the past. See, Consolidated Edison, 78 FERC at ¶ 62,283. In Consolidated Edison, the Commission dismissed intervenors' proposals that the Commission employ an Order 592 Appendix A-type market power analysis to requests for market-based rates. The Commission stated that "it is neither necessary nor appropriate to change the market power screen analysis that we [the Commission] traditionally have used to analyze market-based rate applications." Id. The Commission cited three reasons for continuing to retain a less rigorous hub-and-spoke market power analysis method in market-based rate circumstances than it requires in merger proceedings, which are as follows: (1) mergers involve structural corporate changes in the marketplace and a merger, once consummated, cannot easily be undone; (2) the Commission is required by statute to take initial action on a completed market-based rate application within 60 days and of necessity must use a market screen analysis which it is capable of applying within that short time frame; and (3) an extensive market power screen analysis is not necessary because of the Commission's ability to monitor and remedy market power abuses by utilities charging market-based rates. Id.

The three reasons the Commission cited for declining to adopt a more thorough market power analysis methodology are not persuasive. First, many company requests for market-based rates are intimately wrapped-up with proposed company re-organizations and restructurings. In fact, the Applicants' merger and post-merger restructuring are an integral part of their requests. See, Application at 1 (describing the Applicants' merger and post-merger restructuring). Therefore, the reorganizations/restructurings and the requests for market-based rates cannot be neatly compartmentalized from market-based requests, as the Commission suggests above.

Second, if the Commission were to adopt a standardized market power analysis to be applied by applicants for market-based rates, the sixty day clock referred to by the Commission would not constitute a constraint. The Commission's ability to process more comprehensive market power analyses within the 60 day time period has been revealed by the Commission's expressed willingness to accept submission of the merger policy statement's delivered price test as a *substitute for or in addition to* the traditional hub-and-spoke model. For instance, in New York State Electric & Gas Corp., the Commission allowed, although it did not require, applicants for market-based rates to file Order 592 Appendix-A type analyses, or other alternative approaches, along with their hub-and-spoke analyses in order to "present a more accurate picture of the market," 79 FERC ¶ 61,303 at ¶ 62,363 (1997), or as a substitute for the traditional hub-and-spoke analysis. 78 FERC at ¶ 62,329 n.7. In addition, provided that the criteria that must be applied by the company in performing the more comprehensive test is clearly specified ahead of time, the amount of time necessary for Commission review of the company's filing should be reduced, not increased.

¹² In such circumstances, the appropriate market concentration thresholds, referenced in Step 4, would need to be considered.

Third, and most importantly, the Commission should not rely on monitoring the market for competitive failures and attempts to remedy market power abuses after-the-fact as a reason for not conducting a thorough and complete analysis of market power at the time of application. Initially, such an approach allows market power abuses to develop and harm market participants as well as consumers before efforts are even begun to correct the problem. Once efforts are begun, additional time is required for investigation and, quite likely, litigation. These time restraints in detecting and correcting any abuse of market power merely give the companies possessing such market power an opportunity to exercise market power and entrench themselves as the dominant firm in the market, thereby resulting in further damage to the other market participants and consumers. Finally, performing market monitoring functions is extensive, complicated work, and it is likely market power abuses could go undetected despite efforts from the Commission to perform a market monitoring function. In fact, it appears that recent efforts by the Commission to monitor the market for market failures and abuses may not be proceeding as the Commission had anticipated which, in part, could be the result of the amount of monitoring work necessitated by the Commission's wait-and-see policy. See e.g., Hoecker: Monitoring Must Be Improved; Price Cap Rumor 'Preposterous,' INSIDE FERC (June 26, 2000); Staff to Probe Efficiency of Bulk-Power Market, Root Out Problems, INSIDE FERC, (July 31, 2000).

By continuing to employ an inadequate market power analysis method to market-based rate applications, the Commission permits and creates too much ability of power sellers to exercise market power and far too much work for the Commission's ongoing market monitoring team to handle. If the Commission's market monitoring team is swamped and overwhelmed with work (as it appears from trade press accounts to be), then this is strong evidence that the Commission's market power screen in market-based rate applications is allowing too much in the way of market power conditions to slip

through. Accordingly, the Commission must act now to prevent the harms associated with an inadequate market-power screen from harming the Illinois electricity market, and the Commission should condition any grant of market-based rate authority in this proceeding on a *de novo* review of the Applicants' market power in 2003 based on an Order 592 Appendix A-type analysis. In the alternative, the Commission should establish a technical conference, to be held in Chicago, Illinois, within the next three months, at which an acceptable, alternative market power analysis methodology can be developed.

- C. **The Commission should not grant waiver of the employee separation and power market information aspects of the inter-affiliate code of conduct and should rescind any waiver of the inter-affiliate non-power goods and services transaction rules that it grants in this proceeding prior to the beginning of the test year that ComEd will utilize to establish bundled retail sales rates that will be applicable following the expiration of the statutorily mandated retail rate freeze.**

In addition to the market-based rate authority discussed above, Exelon Generation and its affiliates also request the Commission to waive the Commission's inter-affiliate power sales pricing limitations and code of conduct rules, including the affiliate brokering rules. Application at 3, 19-28. This request is based on the assertion that all the retail and wholesale electric requirements customers of PECO Energy and ComEd are adequately protected by retail access, rate caps and freezes, and other mechanisms. *Id.* The Applicants also cite as support for their request two recent Commission orders, both of which are distinguishable.

With respect to the issue of non-power goods and services transactions between affiliates, the ICC is not prepared to challenge, at this time, Applicants' assertions that all ComEd bundled retail customers are currently adequately "protected" by retail rate caps and rate freezes. Immediate and actual harm to retail customers through January 1, 2005, attributable to inter-affiliate preference, would

be limited due to the rate freeze imposed by the Illinois Customer Choice Law. However, at the time of the rate freeze's expiration in Illinois, the ICC does not believe that retail access in ComEd's service territory will be sufficient to protect retail customers from the consequences of inter-affiliate abuse. Specifically, as explained above, the limited transmission import capability into ComEd's service territory and the high concentration of generation ownership within ComEd's service territory may make choice for the majority of retail customers within ComEd's service territory more illusory than real. Retail customers may not remain *legally* captive to ComEd as a source of generation; however, many will remain *practically* captive to ComEd as a generation source even after they nominally obtain choice because of the limited availability of generation alternatives.

In addition, as explained above in Section III.A.1, in setting new bundled retail rates to be effective January 2, 2005, the ICC may be constrained by the federal filed rate doctrine in its ability to review and disallow inter-affiliate costs for non-power goods and services. Inter-affiliate pricing of non-power goods and services will be established by either the Commission or the SEC and, in either case, the federal filed rate doctrine will apply. While the ICC retains the authority to conduct prudency reviews of ComEd's purchasing decisions, if the Commission waives its inter-affiliate code of conduct rules with respect to the pricing of non-power goods and services, it will become more difficult as a matter of proof to establish imprudency on the part of ComEd as well as more likely that the costs for non-power goods and services that the ICC will be required by the federal filed rate doctrine to pass through into retail rates will be inappropriate.

The Commission should not rely on either of the two cases cited by the Applicants as support for their request. First, the Applicants note that the Commission recently relied on Illinois' retail access program to grant ComEd the right to sell power to affiliated companies for resale at "higher-than-cost

prices when it was selling to non-affiliates at such higher prices under its market-based rate authority.” Application at 24 (citing Commonwealth Edison Co., 85 FERC ¶ 61,288 at ¶ 62,177 (1998)). However, the referenced case is distinguishable because the case involved sales of power from the public utility, ComEd, to the power marketing affiliate. In this case, on the other hand, the public utility, ComEd, will be purchasing all of its power requirements in the wholesale market.

The second case cited by the Applicants, Illinova Power Marketing Inc., 88 FERC ¶ 61,189 (1999), did involve the same type of situation as the Commission is presented in the instant filing. In that case, Illinova Marketing requested authority to sell power to Illinois Power Company at market-based rates, rather than at the cost-based rates that would otherwise apply under the Commission’s affiliate code of conduct.¹³ The Commission granted Illinova Marketing’s request based on the existence of the retail rate freeze imposed by the Illinois Customer Choice Law. Id. at ¶ 61,649. In addition, the Commission authorized continued power sales by Illinova Marketing to Illinois Power at market-based rates *after* the expiration of the retail rate freeze on the assumption that “after the rate freeze expires, Illinois Power’s customers will no longer be captive.” Id.

However, in this case, the assumption about retail customer captivity does not hold for ComEd’s service territory. As explained above, the limited transmission import capability and high concentration of generation ownership in ComEd’s service territory will make the majority of retail customers within ComEd’s territory *practically*, even if not *legally*, captive to ComEd as a source for generation even after customers nominally obtain choice. This factor necessitates the Commission’s departure from its holding in Illinova Marketing.

¹³ It is notable, however, that all other aspects of the Illinova code of conduct were retained.

Accordingly, the ICC recommends that any waiver of the inter-affiliate non-power transaction rules that the Commission may authorize in this proceeding be rescinded prior to the beginning of the test year that ComEd plans to use to establish bundled retail sales service rates to be applicable beginning January 2, 2005. This condition will help to ensure that the new bundled retail rates to be established by the ICC do not subsidize ComEd's power selling affiliates. On the other hand, the employee separation and power market information aspects of the Commission's code of conduct should *not* be waived, even temporarily. These aspects of the code of conduct are necessary to prevent inter-affiliate preference whose exercise would damage the development of a competitive market.

IV. CONCLUSION

WHEREFORE, for each of the aforestated reasons, the Illinois Commerce Commission respectfully requests that, if the Commission grants the Applicants' requests in this docket, that such approval be conditioned on: (1) a *de novo* review of the Applicants' requests for market based rate authority when the Applicants file their updated analysis in 2003; (2) a requirement that the Applicants submit the Merger Policy Statement market power analysis as part of the Commission's *de novo* review of the Applicants' market-based rate authority in 2003 or, in the alternative, that the Commission establish a technical conference, to be held in Chicago, Illinois, within the next three months, at which an acceptable alternative market power analysis methodology can be developed; and (3) rejection of Applicant's request to waive the employee separation and power market information aspects of the Commission's code of conduct and the rescission of any waiver of the Commission's inter-affiliate non-power goods and services pricing rules prior to the beginning of the test year that ComEd plans to use to establish bundled retail sales service rates to be applicable in Illinois beginning on January 2, 2005. The Illinois Commerce Commission also seeks any and all other appropriate relief.

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Respectfully submitted,

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